

It is also clear that Comcast's migration of Philadelphia sports programming from satellite to fiber is driven by anticompetitive motives as well:

Comcast's purchase of the Philadelphia Flyers, 76ers, and Phantoms inspired the company to start up a regional sports network, which debuts this month as a basic cable-service channel. The question now is whether [Comcast President Brian] Roberts can capitalize on an apparent loophole in the 1996 Telecommunications Act [sic] in order to lock up the Philly area's sports programming. "*We don't like to use the words "corner the market," because the government watches our behavior,*" Roberts says with a laugh. "Let's just say we've been able to do things before they're in vogue."^{54/}

Furthermore, the implications of satellite-to-terrestrial migration extend far beyond the New York and Philadelphia markets. As the Commission is aware, the cable industry now controls a substantial portion of the most popular local sports programming available in the marketplace today, and failure to definitively address the migration problem now would create precedent for vertically-integrated cable sports networks in *many* markets to avoid selling to cable's competitors by switching from satellite to terrestrial delivery.^{55/} Moreover, the prospect of widespread satellite-to-

^{54/} "The New Establishment - - Vanity Fair's Fifty Leaders of the Information Age, *Vanity Fair*, at 166 (Oct. 1997) [emphasis added].

^{55/} For example, earlier this year Fox and TCI announced an agreement to purchase 40 percent of Rainbow Media Holdings, Inc., thereby creating Fox Sports Net. Umstead, "Fox Builds Sports Empire," *Multichannel News*, at 1 (June 23, 1997). Fox Sports Net has become the nation's second-largest sports network with 55 million cable subscribers in 17 major markets, behind only ESPN. "New Teammates: Fox/Liberty Nets, Sportschannel," *Media Daily* (July 1, 1997). By stringing together Fox/Liberty's nine existing regional sports networks and the eight regional services owned by Rainbow, the new venture also will control the local cable rights to 20 Major Baseball League teams, 17 NBA teams and 12 NHL franchises. *Id.* Further, Fox Sports Net will have the rights to college football and basketball games from 20 conferences, including the ACC, Big East, Colonial Athletic and Atlantic 10. "New Teammates: Fox/Liberty Nets, Sportschannel," *Media Daily* (July 1, 1997). As a Fox Sports Net executive recently put it, "we have become quite a behemoth." *Id.*

terrestrial migration becomes increasingly likely as the large MSOs continue to combine their systems into regional "clusters" that can be linked via fiber. As noted by the Commission:

Programming that is used by a single system or group of interconnected systems is typically distributed terrestrially. . . [T]here . . . has been a trend toward a greater linkage of cable systems in regional clusters through fiber optic connections which are now much more generally available. These facilities, once in place, would typically have the capacity to distribute a number of channels of service.^{56/}

As to the Commission's legal authority to prohibit satellite-to-terrestrial migration under Section 628(b), that provision states, in relevant part:

It shall be unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purposes *or* effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.^{57/}

Thus, to make a threshold showing that a satellite-to-terrestrial migration of programming is actionable as an "unfair practice" under Section 628(b), a complainant must demonstrate (1) that the programmer is a "cable operator" and (2) that the migration had *either* the purpose *or* effect of "hindering significantly" or "preventing" the complainant from providing satellite cable programming to its subscribers. The former can be demonstrated by showing that the programmer is vertically integrated, the latter by presenting evidence that the programmer has denied the complainant access in reliance on the "terrestrial delivery" exception. The only remaining question,

^{56/} Kennard Letter, Response to Questions at 6. Also, as pointed out by GE Americom, satellite-to-terrestrial migration also distorts network facilities competition to the extent that it incents programmers to pay higher rates to bypass satellites and use less efficient terrestrial networks. Letter from Philip V. Otero to William E. Kennard re: CS Docket No. 97-141, at 3 (Nov. 17, 1997).

^{57/} 47 U.S.C. § 548(b).

then, is whether the programmer's refusal to deal under these circumstances is "unfair" as that term is used in Section 628(b).

Using what WCA expects will be a common refrain among cable operators who attempt a satellite-to-terrestrial evasion of the program access rules, Comcast has argued that Section 628(b) cannot confer jurisdiction over satellite-to-terrestrial migration as an "unfair practice" because Comcast SportsNet is now a terrestrially-delivered service, and thus Comcast's refusal to sell Comcast SportsNet to DIRECTV does not prevent DIRECTV from offering "satellite delivered cable programming" to its subscribers.^{58/} The plain objective of the statute, however, is to regulate cable operator *behavior* designed to keep satellite cable programming away from cable's competitors, and that is precisely what cable operators are doing when they deliberately migrate programming from satellite to terrestrial delivery and then refuse to sell it to alternative MVPDs for that reason. It is therefore no accident that the Commission clarified in its *OVS Second Report and Order* that it would "not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."^{59/}

Moreover, as the Commission pointed out at length in its recent *Report and Order and Second Further Notice of Proposed Rulemaking* pertaining to cable inside wiring, Section 4(i) of the Communications Act of 1934, as amended, permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be

^{58/} Answer of Comcast SportsNet, *et al.* re: CSR-5112-P, at 8-13.

^{59/} *Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd 18223, 18325 n.451 (1996).

necessary in the execution of its functions.”⁶⁰ Since Section 628(b) gives the Commission jurisdiction over unfair program access practices by cable operators, there is no inconsistency between Section 628(b) and the Commission’s assertion of jurisdiction over program access complaints alleging unlawful satellite-to-terrestrial migration of programming. Thus, even if the Commission were now to reverse the *OVS Second Report and Order* and hold that it does not have express statutory authority under Section 628(b) to adjudicate such complaints, the Commission has more than ample authority to do so under Section 4(i) and its broader statutory mandate to promote competition among multichannel video programming distributors.

WCA recognizes that, as currently written, the program access statute does not provide alternative MVPDs with access to *all* terrestrially-delivered cable programming, and that ultimately the best solution to the problem is to recommend to Congress that the “terrestrial delivery” exception be removed from the 1992 Cable Act. For instance, the program access statute does not give an alternative MVPD access to a local cable news channel that has *never* been distributed via satellite delivery of programming. Even in cases of satellite-to-terrestrial migration, the statute might not apply where there is otherwise no evidence that the migration was designed to prevent competitors from obtaining access to the programming. All available evidence to date, however, indicates that evasion of the program access rules is the primary rationale for the cable industry’s gradual migration of programming to terrestrial delivery.

⁶⁰ *Telecommunications Services - Inside Wiring*, CS Docket No. 95-184 and MM Docket No. 92-260, FCC 97-376, at ¶ 83 (rel. Oct. 17, 1997), *citing* 47 U.S.C. § 154(i).

E. The Commission Should Issue a Further Notice of Proposed Rulemaking to Determine Whether The Attribution Standards in Section 73.1000(b) Should Be Modified To Encompass New Relationships Between Programmers and Cable Operators.

While recognizing that there are concerns that access to programming from nonvertically integrated programmers may inhibit competition, the Commission has elected not to issue a *Notice of Proposed Rulemaking* on that issue, citing lack of sufficient evidence.^{61/} It appears that, at least to some extent, the Commission is concerned that the “vertical integration” requirement in Section 628 of the 1992 Cable Act precludes it from asserting jurisdiction over additional programmers.^{62/} WCA is commenting on this matter only to point out that there is a way for the Commission to address the problem without running afoul of the statute.

The Commission has already acknowledged that alternative MVPDs are being denied access to programming that does not technically qualify as “vertically integrated” as that term is currently defined by the Commission, *e.g.*, Fox News, MSNBC, Game Show Network, Eye On People, Home & Garden Television and TV Land.^{63/} Mr. Oristano has described the effect on competition as follows:

Channels such as MSNBC, F/X, Fox News, CBS Eye on People and others were created as a way for broadcasters to get something other than money for carriage of their free TV channels on cable. The cable industry demanded these channels be exclusive. Thus, today, companies like PCTV, Ameritech, Wireless One and others are faced with NBC using its *free* television franchise to undermine cable

^{61/} *NPRM* at ¶ 36.

^{62/} See Separate Statement of Commissioner Harold W. Furchtgott-Roth re: *NPRM* (“I would like to emphasize that the Commission’s duty in this area - - *as in all areas* - - is to faithfully implement the law that Congress passed and that the President signed.”) [emphasis in original].

^{63/} Kennard Letter, Responses to Questions at 1.

competition. Celebrities like Tom Brokaw, Katie Couric, and Jane Pauley exhort viewers to tune to MSNBC as soon as they're done watching NBC, even though cable's competitors on the ground can't get MSNBC. The situation will grow worse as Microsoft introduces Windows 98, and places an MSNBC icon on each desktop. The ability of new desktop PC's to process video can then be used by the monopoly software provider to push viewers to the monopoly video provider.^{64/}

As repeatedly noted by WCA in other proceedings, the recent wave of joint ventures between programmers not traditionally considered to be vertically integrated (*e.g.*, Fox and Microsoft) with highly vertically-integrated cable operators (TCI, Time Warner, Comcast, Continental/US WEST, and Cablevision) strongly suggest that the Commission's present definition of "vertical integration" is too narrow to encompass the broad variety of business relationships within the cable industry that clearly threaten the availability of programming to cable's competitors. Under Section 76.1000(b) of the Commission's Rules, a cable programmer is not "vertically integrated" and is therefore permitted to enter into exclusive contracts with the cable industry) unless it is at least 5% owned by a cable operator. It is therefore no coincidence that programmers and cable operators are now structuring their business relationships in a manner which circumvents the technical definition of "vertical integration" and thus all of the Commission's program access rules. For example, Fox's deep and wide-ranging relationships with the cable industry (not the least of which is its proposed \$1 billion investment in the cable-controlled Primestar DBS service) are such that it has every reason to *behave* like a vertically-integrated programmer and do whatever is necessary to avoid selling its product to cable's competitors.^{65/} Yet because Fox itself does not own any cable systems, it is free

^{64/} Oristano Testimony at 7 (emphasis in original).

^{65/} See, *e.g.*, Petition to Deny or, Alternatively, Request for Imposition of Conditions (filed Sept. 25, 1997) and Consolidated Reply (filed Oct. 20, 1997) submitted by The Wireless Cable Association (continued...)

to give the cable industry exclusivity with respect to FNC and any other channel wholly owned by Fox now or in the future. The same is also true of Microsoft, whose \$1 billion investment in Comcast does not qualify as "vertical integration" of MSNBC (since Microsoft is not a cable operator), but who nonetheless has enormous economic incentive to placate Comcast and other cable operators by refusing to provide MSNBC to cable's competitors.^{66/}

The Commission recently observed that "[i]t is probably fair to say that the general conclusion is that any analysis should focus on the source of any market power involved (the absence of competition at the local distribution level) *rather than on vertical integration itself*."^{67/} Fortunately, because the program access statute leaves the definition of "vertical integration" entirely within the Commission's exclusive discretion, the Commission has the authority to address this problem *now* by commencing a rulemaking to address whether the attribution standards in Section 76.1000(b) should be modified to encompass not only cable ownership of programming services, but significant business relationships between cable operators and programmers which have the same

^{65/} (...continued)

International, Inc. Re: FCC File No. 106-SAT-AL-97.

^{66/} Indeed, Microsoft's investment in Comcast is just one of a series of current and potential transactions with the cable industry which will add to Microsoft's incentive to avoid dealing with alternative MVPDs. *See, e.g.,* "Developers Gain While Bill and Scott Fight," *Multimedia Week* (Jan. 14, 1998) (reporting that Microsoft's Windows CE operating system will be used in at least 5 million TCI digital cable set-top boxes); *Media Daily* (Dec. 5, 1997) (reporting that TCE-backed @ Home cable-modem service will use Microsoft Internet Explorer 4.0 as its default browser). Not coincidentally, Microsoft CEO Bill Gates will be the keynote speaker at the 1998 National Cable Television Association annual convention. *Communications Daily*, at 9 (Jan. 16, 1998).

^{67/} Kennard Letter, Responses To Questions at 3 (emphasis added). *See also id.* at 7 ("[R]egardless of the method of delivery, where programming is unfairly or anti-competitively withheld from distribution, competition is deterred or impeded.").

(if not greater) adverse effect competition as the relationships covered by the current attribution rule.^{68/} Given the growing web of complex cable/programmer relationships that currently fall outside the purview of the program access rules, and their already substantial adverse effect on the program access rights of wireless cable operators and other alternative MVPDs, WCA submits that the Commission can and should issue such a rulemaking to develop a full and complete record on this matter and thereby ensure that its current attribution standards remain consistent with the pro-competitive objectives of Congress under current market conditions.

III. CONCLUSION.

There is little question that over the next few years the Commission will be regulating a multichannel video marketplace that will look far different than the one that produced the original program access rules in 1993. Consolidation and joint ventures among cable operators and programmers is reaching an all-time high, as are economic incentives for programmers to take advantage of every loophole available under the current rules to placate the cable industry. WCA believes that the time has come for the Commission to close these loopholes as suggested herein and thereby ensure that its regulatory framework satisfies the demands of the new environment and remains consistent with the broader pro-competitive objectives of Congress.

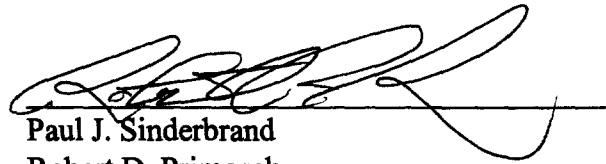
^{68/} The Commission could consider, for example, whether the program access attribution standards should be modeled on the former cable-telco cross-ownership rule (47 C.F.R. § 63.54), which prohibited significant business relationships as well as common ownership between cable systems and telephone companies in the same service area.

WHEREFORE, WCA respectfully requests that the Commission amend its program access rules in accordance with the comments set forth above.

Respectfully submitted,

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